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NO. 80-1012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES A. GULDEN AND
RICHARD R. SAGE,

Petitioners,

VS.

MONROE McCORKLE,
GEORGE DICKERSON AND
THE CITY OF DALLAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF

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CITY OF DALLAS

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RESPONDENTS' BRIEF

TO THE HONORABLE JUSTICES OF SAID COURT:

Monroe McCorkle, George Dickerson and the City of Dallas, the Respondents, respectfully submit the following brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Proceedings in the District Court and the Court of Appeals

This is a civil rights case in which public employees contend that they were deprived of their Fifth Amendment

right against self-incrimination because they were discharged for refusing to answer questions in a polygraph examination. The employees claim that their supervisors attempted to extract a waiver of the employees' right against self-incrimination, failed to warn them that their testimony would be inadmissible in criminal proceedings, and sought to ask them questions which were not job-related.

The district court found that the employees were not advised that their answers could not be used in criminal proceedings, but found that the employees would not have submitted to the polygraph examination even if they had been warned (Record, Vol. I at 85, paragraph 22). The district court found that no waiver was required by the City (Record, Vol. I at 85, paragraph 21) and that the City's inquiry was job-related (Record, Vol. I at 84, paragraph 20). The district court concluded that the employees were not deprived of their right against self-incrimination (Record, Vol. I at 86-87), rendered judgment for the City (Record, Vol. I at 89), and the employees appealed. The Court of Appeals for the Fifth Circuit affirmed, 680 F.2d 1070, rehearing denied, 685 F.2d 157.

STATEMENT OF FACTS

Petitioners, Gulden and Sage, were employees of the Property Management Division of the Public Works Department of the City of Dallas. Respondents McCorkle and Dickerson were the Director and Assistant Director of the Public Works Department.

Supervisors within the Property Management Division had been subjected to a series of harassing pranks by a person or persons who apparently had knowledge of the personnel and operations of the Property Management Division (Record, Vol. I at 84, paragraph 20; Vol. II at 19,

20, 23, 55, 56, 57, 63, 68). When the head of the Property Management Division retired, he was honored at a celebration in the cafeteria of the building occupied by the Property Management Division and other city offices (Record, Vol. I at 82; Vol. II at 25). Shortly before that retirement party was to begin, another city office in the building received a telephoned bomb threat (Record, Vol. I at 82; Vol. II at 12, 13). That bomb threat forced the evacuation of the entire building, and disrupted the retirement party (Record, Vol. I at 82; Vol. II at 13, 53, 54).

McCorkle and Dickerson viewed the bomb threat as another prank directed at Property Management Division supervisors (Record, Vol. I at 84; Vol. II at 20, 25), and by written memorandum directed all Property Management Division employees to take a polygraph examination to "determine whether or not you have any knowledge concerning the bomb threat" (Record, Vol. I at 82-3, 84; Vol. II at 53, 149, 150, 199). The memorandum expressly stated that the polygraph questions would "concern only your knowledge of the bomb threat and no other subject" (Record, Vol. I at 84; Vol. II at 53, 149, 150, 199). Gulden and Sage refused to submit to the polygraph examination and, therefore, were asked no questions (Record, Vol. I at 83). Those employees who did submit to the examination where asked only the examiners' "control" questions and questions relating directly to the bomb threat (Record, Vol. I at 84; Vol. II at 199). There was no evidence that the polygraph examiners asked any questions not related to the bomb threat (Record, Vol. II at 197-199), and there was no evidence that the Petitioners sought to have the examiners ask any questions not related to the bomb threat (Record, Vol. I at 84). Gulden and Sage were fired because they refused to submit to the polygraph examination (Record, Vol. I at 84).

SUMMARY OF ARGUMENT

The employees would not have taken the polygraph examination even if they had been given an appropriate warning and, therefore, the failure to give such a warning could not have been a proximate cause of any injury to the employees.

The district court's finding, that the employees were not required to waive their self-incrimination privilege, is not challenged as clearly erroneous, is not clearly erroneous, and should not be disregardeed.

The district court's finding, that the polygraph questions were job-related, is supported by the evidence and is not clearly erroneous.

ARGUMENT

The dismissal of public employees for refusing to submit to a polygraph examination does not violate the Fifth Amendment privilege against self-incrimination where the employer requires only that employees answer questions specifically, directly, and narrowly relating to the performance of their official duties without requiring relinquishment of the benefits of the constitutional privilege. *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968).

This Court has neither held nor intimated that a public employee has a right to keep his job after refusing to testify about job-related matters. The Court, instead, has held only that a public employee cannot be dismissed for refusing "to execute a document purporting to waive his constitutional rights and to permit prosecution of himself on the basis of his compelled testimony." *Gardner v. Broderick*, 392 U.S. 273,

279 (1968). It is compelled testimony in combination with a compelled waiver of immunity which violates the constitutional privilege, and the Court has found constitutional violations only where express waivers were demanded. See *Gardner v. Broderick*, 392 U.S. 273, 274 (1968), *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280, 282-3 (1968), *Lefkowitz v. Turley*, 414 U.S. 70, 76 (1973) and *Lefkowitz v. Cunningham*, 431 U.S. 801, 802 (1977). If no waiver is demanded, the employee is protected against use of his own testimony, *Garrity v. New Jersey*, 385 U.S. 493 (1967), and the purpose of the privilege is fully served.

The Polygraph Examination Was Job-Related

The memoranda which directed Gulden and Sage to submit to a polygraph examination stated that employees were directed to submit to an examination "to determine whether or not you have any knowledge concerning the bomb threat on Monday, August 14, 1978 at 1500 West Mockingbird" and that "the questions will concern only your knowledge of the 'bomb threat' and no other subject." (See Plaintiffs' Exhibits 4, 8, 12, 17, 23). Gulden and Sage refused to submit to a polygraph examination and, of course, were asked no questions, job-related or otherwise. The questions asked those employees who did submit to the polygraph examination consisted only of the examiners' "control" questions and questions relating to the bomb threat (See Defendants' Exhibits 3, 4, 14, 15).

There is no evidence that the polygraph examiners asked any questions unrelated to the bomb threat, and there is no evidence that McCorkle and Dickerson sought to have the examiners ask any questions not related to the bomb threat.

Questions concerning the bomb threat were job-related because the person who made the bomb threat seriously disrupted the operations of the Property Management Division, because the bomb threat appeared to be intended as an attempt to harass the retiring director of the Property Management Division, and because the bomb threat was perceived as one in a series of harassing pranks directed toward employees, especially supervisors, of the Property Management Division. Those pranks, according to the testimony of McCorkle and Dickerson had adversely affected morale and had reduced productivity in the Property Management Division (Record, Vol. II at 19, 20, 23, 57, 63, 68).

Waiver of the Privilege

There was no contention in the district court, and no evidence, that McCorkle and Dickerson demanded that Golden and Sage waive their right to invoke the self-incrimination privilege and thereby relinquish the right to exclude from evidence in a criminal trial any statements which they might make during the polygraph examination. There is no state statute, city ordinance or city personnel rule which purports to create any such waiver.

The "Advice" Requirement

Sage did not refuse to submit to a polygraph examination because of any concern that he might provide testimony which could be used to prosecute him criminally; instead, he refused to submit to the polygraph examination because "I was not notified when I accepted employment with the City of Dallas that I would be required to take polygraph tests as a condition of my employment" (Plaintiffs' Exhibit 10), because the demand for the polygraph examination

"smacks of selective discrimination" (Plaintiffs' Exhibit 10), because "no other divisions within the City of Dallas are being required to take this polygraph" (Plaintiffs' Exhibit 10), because "I have not been charged with any City of Dallas Code of Conduct violation and therefore I see no reason to submit to a polygraph examination" (Plaintiffs' Exhibit 10), and because "I would not take the polygraph under any circumstances because I don't believe in them" (Plaintiffs' Exhibit 29, Volume III, page 47). Sage described in writing his reasons for refusing to submit to a polygraph examination, and his written refusal (Plaintiffs' Exhibit 10) contains no mention of any concern that he might be waiving his right against self-incrimination or that he might be providing testimony which could be used to prosecute him criminally. The district court found that advising Sage that his statements would be inadmissible in a criminal prosecution would not have overcome any of his objections to the polygraph examination, and he would not have submitted to the examination even if he had been so advised (Record, Vol. I at 85, paragraph 22; Vol. II at 92, 152).

Gulden did not refuse to submit to a polygraph examination because of any concern that he might provide testimony which could be used to prosecute him criminally; instead, he refused to submit to the polygraph examination because "I feel that this is not within your rights as defined in my employment contract with the City" (Plaintiffs' Exhibit 9), because "inasmuch as I have previously, in writing and verbally, requested a lie detector test on other matters concerning violations of city rules and civil rights, this same principle will adhere to this situation" (Plaintiffs' Exhibit 9), and because "it has been made public that you personally have animosity toward individuals within the small group directed to submit to this polygraph test"

(Plaintiffs' Exhibit 9). Gulden described in writing his reasons for refusing to submit to a polygraph examination, and his written refusal (Plaintiffs' Exhibit 9) contained no mention of any concern that he might be waiving his right against self-incrimination or that he might be providing testimony which could be used to prosecute him criminally. The district court found that advising Gulden that his statements would be inadmissible in a criminal prosecution would not have overcome any of his objections to the polygraph examination, and he would not have submitted to the examination even if he had been so advised (Record, Vol. I at 85, paragraph 22).

Although Gulden and Sage now claim that they were deprived of their Fifth Amendment privilege because they were not advised of the inadmissibility of their testimony, such advice would not have altered their decision to refuse the polygraph. Since the giving of that advice would not have changed their decision, they were not harmed by its omission. See *Carey v. Piphus*, 435 U.S. 247, 260 (1978), *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252, 270-271 (1977) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-287 (1977).

CONCLUSION AND PRAYER

Gulden and Sage were never asked to waive their right to invoke the self-incrimination privilege of the Fifth Amendment in a criminal proceeding; the polygraph examination was job-related; advising them that their testimony would be inadmissible against them in subsequent criminal proceedings would have been of no effect. McCorkle and Dickerson, therefore, did not condition Gulden's and Sage's con-

tinued employment upon the relinquishment of their right to exclude their own testimony from evidence in a criminal proceeding, and did not in any way deprive them of their Fifth Amendment privilege against self-incrimination. The petition for writ of certiorari should be denied.

Respectfully submitted,

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By .....
Assistant City Attorney

CERTIFICATE OF SERVICE

A copy of the foregoing instrument was served by mail on Kenneth Molberg, attorney for Petitioners, on the 6th day of January, 1983.

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JOSEPH G. WERNER